86-1242

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF AKRON, STATE OF OHIO; HEALTH COMMISSION, CITY OF AKRON; HEALTH DEPARTMENT, CITY OF AKRON; C. WILLIAM KECK, as Director of Health of the City of Akron; HAROLD K. STUBBS, as Director of Law of the City of Akron,

Appellants,

v.

OHIO MANUFACTURERS' ASSOCIATION; AKRON SELLE COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Akron, Ohio has enacted a "right-to-know" ordinance, which imposes certain labeling and other disclosure requirements upon employers using hazardous and toxic substances in the workplace. The Department of Labor, acting under Section 6 of the Occupational Safety and Health Act of 1970 (the OSH Act), 29 U.S.C. § 655, has promulgated a federal "hazard communication standard," 29 C.F.R. § 1910.1200, which imposes similar but not identical requirements on certain classes of employers. Under Section 18 of the OSH Act, 29 U.S.C. § 667, "any State" wishing to regulate an occupational safety and health issue governed by a federal standard may do so only pursuant to a "State plan" which must be approved by the Department of Labor, and which, once approved and placed in effective operation for three years, displaces the federal standard for that state. The questions presented are:

1. Whether the Akron ordinance, to the extent that it regulates workplace practices of employers governed by the federal standard, is preempted by Section 18 of the OSH Act, despite the fact that Section 18 refers only to the states and is wholly silent with respect to local laws.

2. Whether, if Section 18 of the OSH Act does not preempt the Akron ordinance, the hazard communication standard issued by the Department of Labor should be construed as doing so, and if it is to be so construed, whether the issuance of such a preemptive standard is within the authority of the Department under the OSH Act.

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Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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JURISDICTIONAL STATEMENT

Appellants, who are the City of Akron, Ohio, and certain of its agencies and officials,[1] appeal from the judgment of the United States Court of Appeals for the Sixth Circuit entered on September 17, 1986, holding that Akron's "right-to-know" ordinance is preempted by the

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[1] All parties in the court below are listed in the caption. In addition to those parties, *amicus curiae* briefs were filed below by the Secretary of Labor and various industry and labor groups. These *amici* are listed in footnote 2 of the court of appeals' opinion (A. 2a).

hazard communication standard issued under the Occupational Safety and Health Act of 1970 by the Department of Labor, to the extent that the ordinance applies to workplace practices of employers governed by the federal standard.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported; it is reproduced in the Appendix at page 1a. The opinion of Judge Ann Aldrich of the United States District Court for the Northern District of Ohio, Eastern Division is reported at 628 F. Supp. 623 and is reproduced in the Appendix at page 22a.

JURISDICTION

This action was brought by appellees Ohio Manufacturers' Association and Akron Selle Company to enjoin enforcement of Chapter 1830 of the Codified Ordinances of the City of Akron, Ohio, on the ground, *inter alia*, that it was preempted by federal law. Jurisdiction was founded upon 28 U.S.C. § 1331. The district court entered judgment for the defendants, but on appeal the court of appeals reversed, holding that the ordinance was preempted to the extent that it applied to workplace practices of employers governed by the federal hazard communication standard, 29 C.F.R. § 1910.1200, issued by the Department of Labor pursuant to Section 6 of the OSH Act, 29 U.S.C. § 655.

The judgment of the court of appeals (A. 60a) was entered on September 17, 1986. Appellants then filed a timely petition for rehearing, which the court of appeals denied by an order dated October 31, 1986. (A. 61a).

This court has jurisdiction of the present appeal pursuant to 28 U.S.C. § 1254(2).

CONSTITUTIONAL PROVISION, STATUTES, AND REGULATION INVOLVED

This case involves Article VI, Cl. 2 (the Supremacy Clause) of the Constitution; Sections 2, 3, 6, 18, and 23 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, 652, 655, 667, 672; the Hazard Communication Standard issued by the Occupational Safety and Health Administration (OSHA) of the Department of Labor, 29 C.F.R. § 1910.1200; and Chapter 1830 of the Codified Ordinances of the City of Akron, Ohio; all of which are set forth in the Appendix at pp. 63a-125a.

STATEMENT OF THE CASE

Appellees Ohio Manufacturers' Association and Akron Selle Company brought this action in the United States District Court for the Northern District of Ohio to enjoin enforcement of the "right-to-know" ordinance of the City of Akron, Ohio, which imposes certain labeling and other disclosure requirements on employers using hazardous and toxic substances. The ordinance, Chapter 1830 of the Codified Ordinances of the City of Akron, is reproduced in the Appendix at pages 64a-88a, and is described more fully below (pp. 6-7, *infra.*)

The complaint challenged the ordinance on three grounds: (1) that it was preempted by the federal Occupational Safety and Health Act of 1970 and the hazard communication standard issued thereunder by the Department of Labor, which deals with the same general subject matter, (2) that it imposed an undue burden on interstate commerce in violation of the Commerce Clause of the Constitution, and (3) that in certain respects it conflicted with and was preempted by an Ohio statute. Appellees later abandoned the latter two grounds and placed their full reliance on the federal preemption claim.

The District Court Decision

After a hearing, the district court issued a memorandum and order granting judgment for appellants. (A. 22a) The court rejected appellees' principal argument that Section 18 of the OSH Act, 29 U.S.C. § 667, was intended to apply to local ordinances as well as to state statutes. Section 18 precludes any "State" from regulating matters governed by a federal occupational safety and health standard except pursuant to a "State plan" approved by the Secretary of Labor in accordance with procedures set out in the Section. Once a state plan has been approved and found to be effective in operation, it displaces the federal standard and the federal enforcement mechanism. The court concluded from the language of the statute, its legislative history, and a comparison of Section 18 with the preemption provisions of other federal regulatory statutes, that Section 18 was intended to apply only to state statutes, not local ordinances. Moreover, the court found that the purpose of the OSH Act as a whole was not to preempt state and local laws with a uniform federal regulatory scheme governing occupational health and safety, but rather to establish minimum federal standards which the states (subject to the procedures of Section 18) as well as local governments remain free and are even encouraged to supplement with more stringent requirements.

The district court also rejected appellees' argument that the federal hazard communication standard should be construed as preempting local ordinances dealing with the same subject matter. Appellees based this argument largely on certain language which appeared in the explanatory preambles that accompanied both the proposed and final standard. The court held that these preambles were not part of the standard and did not have the force of law, as they were not adopted in accordance with the rulemaking procedures of the Administrative Procedure Act. Moreover, the court held, if the standard were to

be construed as preempting local ordinances it would be in conflict with the intent of Congress as expressed in the OSH Act itself, and therefore in excess of the Labor Department's authority under the Act.[2]

The Court of Appeals Decision

On appeal, the Sixth Circuit reversed. Although the court of appeals agreed with the district court that Section 18 of the OSH Act did not preempt local ordinances, the court concluded that the hazard communication standard issued by the Department of Labor, when read in light of the preambles relied on by appellees, expressed an intent by the agency to preempt both state statutes and local ordinances dealing with the same subject matter. The court held that the agency had authority to issue such a preemptive regulation despite the absence of any indication of preemptive intent in the OSH Act itself.

Although the court of appeals held the ordinance preempted to the extent that it attempts to regulate safety in the workplace of employers governed by the federal standard, the court noted that "the ordinance also had as its purpose protection of the public and the providing of information to city fire fighters and public health officials regarding toxic and hazardous substances." (A. 21a) Accordingly, the court remanded the case to the district court "to determine which portions of the ordinance are preempted and whether those portions that are not preempted are severable." (*Id.*)

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[2] The district court recognized that if the Akron ordinance created an "actual conflict" with the federal standard by making compliance with both a "physical impossibility" or by frustrating the federal policy then the ordinance would have to give way to the federal standard. (A. 48a) However, after analyzing nine separate areas in which appellees alleged that such a conflict existed, the court concluded that there was no such conflict and that employers could comply with both the ordinance and the federal standard. (A. 48a-57a)

The Akron Ordinance

As stated in its preamble, the Akron ordinance was enacted to protect workers, firefighters, and the public by requiring "the labeling of toxic and hazardous substances" and making available "information about such substances to employees, public officials, and other affected persons." (A. 64a) It applies to employers in various specified Standard Industrial Classification (SIC) Codes (§ 1830.03(i)), including but not limited to those governed by the federal hazard communication standard discussed below. Certain employers and substances are exempted. (§ 1830.02)

The ordinance calls for the promulgation of a Master List of Hazardous Chemicals by the Akron Health Commission. (§ 1830.05) Employers that manufacture, use, or store such chemicals are required to take the following actions:

—Post a sign notifying employees of their right to certain information concerning those chemicals. (§ 1830.06 (a))

—Develop a hazard communication program in accordance with certain criteria specified in the ordinance. (§§ 1830.06(b), 1830.07 through 1830.11)

—Label each container of hazardous chemicals with certain specified information. (§ 1830.07)

—File with the Akron Health Department each year a list of all work areas where hazardous chemicals are manufactured, used or stored and identifying such substances by their chemical name. (§ 1830.09(a)(1))

—Immediately report to the Health Department any information concerning any spill, leak, discharge or emission of any hazardous substance that is required to be submitted to any federal or state agency under applicable law. (§ 1830.09(a)(2))

—File with the Health Department a copy of any construction or operating permit that sets forth conditions for or limitations on the discharge or emission of any hazardous chemical. (§ 1830.09(a)(3))

—Obtain or develop for each hazardous chemical that the employer manufactures, uses, or stores a "material safety data sheet" (MSDS) that contains certain specified information including the identity of the substance, its physical and chemical characteristics, its known health effects, the primary route[s] of entry and permissible exposure limits, precautions for safe handling, control measures, emergency and first aid procedure, the date of preparation of the MSDS, and the identity of the preparer. (§ 1830.10(a))

—Provide a copy of the MSDS to any employee, designated employee representative, or the Akron Health Commission within one business day of any request for such a copy. (§ 1830.10(b))

—Establish an employee training and education program to provide employees the information needed to understand the hazards of substances to which they may be exposed, the hazard communication methods used by the employer, appropriate work practices, protective measures, emergency procedures, and the means for obtaining information under the ordinance. (§ 1830.11)

In addition, the ordinance provides procedures for obtaining variances (§ 1830.08), for protecting trade secrets (§ 1830.14), for enforcement of its requirements (§§ 1830.12, 1830.13), and for protecting employees against retaliation for exercising their rights under the ordinance (§ 1830.15)

The Federal Hazard Communication Standard

The federal hazard communication standard, 29 C.F.R. § 1910.1200, was promulgated by the Department of Labor pursuant to Section 6 of the OSH Act, 29 U.S.C.

§ 655. Its stated purpose "is to ensure that the hazards of all chemicals produced or imported by chemical manufacturers or importers are evaluated, and that information concerning their hazards is transmitted to affected employers and employees within the manufacturing sector." (§ 1910.1200(a))

The term "employer" is defined by the standard as "a person engaged in a business within SIC Codes 20 through 39 where chemicals are either used, or are produced for use or distribution." (§ 1910.1200(c)) Therefore, when the word "employer" is used in the standard (or in the following summary of its provisions), it refers only to these categories of employers.

The standard requires chemical manufacturers and importers to evaluate the chemicals they produce or import "to determine if they are hazardous." Employers who are not chemical manufacturers or importers are entitled to rely on the evaluation performed by the manufacturer or importer. Procedures for performing the evaluations are outlined in the standard. Certain chemicals are identified by the standard as being hazardous or carcinogens, but—unlike the Akron ordinance—no comprehensive list of hazardous chemicals is provided. (§ 1910.1200(d))

Chemical manufacturers, importers, or distributors are required to label "each container of hazardous chemicals leaving the workplace" with information identifying the hazardous chemical, "[a]ppropriate hazard warnings," and the name and address of the manufacturer, importer, or other responsible party. (§ 1910.1200(f))

Chemical manufacturers and importers are also required to develop an MSDS for each hazardous chemical they produce or import, which must contain "at least the following information:" specified data relating to the identity of the hazardous chemical, the physical and chemical characteristics of the hazardous chemical, the

physical hazards of the chemical, the health hazards of the chemical, the primary route(s) of entry, permissible exposure limits as prescribed by law or recommended by the preparer of the MSDS, whether the chemical is listed in certain specified compilations of hazardous chemicals, any generally applicable precautions for safe handling, any generally applicable control measures, emergency and first aid procedures, the date of preparation of the MSDS, and the name and address of the preparer. (§ 1910.1200(g)(2))

The MSDS must be provided to distributors and manufacturing purchasers of hazardous chemicals. (§ 1910.1200(g)(6)) Distributors, in turn, must provide the MSDS to other distributors and manufacturing purchasers. (§ 1910.1200(g)(7))

Employers must maintain copies of the MSDS for each hazardous chemical in the workplace and ensure that it is accessible during each work shift to employees in the work area. (§ 1910.1200(g)(8)). They must also make them available upon request to employee representatives and to the Department of Labor. (§ 1910.1200(g)(10))

Employers are required to develop and implement a written hazard communication program (§ 1910.1200(e)) and an employee training program (§ 1910.1200(h)(2)). The requirements of both programs are stated as minimums—i.e., the communication program must provide "at least" certain specified information, and the training program must include "at least" certain specified elements.

The standard also contains procedures for protecting trade secrets. (§ 1910.1200(i))

Both at the time the hazard communication standard was initially proposed and when it was finally adopted, the Department of Labor expressed the view that any

federal standard adopted would have the effect of preempting both state and local laws dealing with the same subject matter. Thus the preamble to the proposed standard, after noting the concern expressed by "a number of industry representatives" about the "potential for conflicting or cumulatively burdensome state and local laws," stated:

> A single, comprehensive Federal Standard for hazard communication would eliminate this conflict, decrease the cumulative burden of compliance, and insure basic protection for all employees.

47 Fed. Reg. 12095 (1982). Similarly, in the preamble to the final standard, the Department again referred to "burdensome State and local laws" as a reason cited "by industry representatives" for promulgation of a federal standard. 48 Fed. Reg. 53284 (1983).

The standard as adopted, however, says nothing about local right-to-know ordinances; it merely paraphrases the effect of Section 18 of the OSH Act on *state* laws:

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C. 651 et seq.) which deals with state jurisdiction and state plans.

(§ 1910.1200(a)(2))

The Differences Between The Akron Ordinance and The Federal Standard

As the above summaries indicate, the Akron ordinance and the federal hazard communication standard are quite similar in their basic requirements. There are,

however, some differences betwen them, although, as the district court found, employers would have no difficulty complying with both.

One obvious but important difference is that the ordinance is enforceable by local officials, while the federal standard is enforced by the Department of Labor. Because the Department of Labor has limited resources and nationwide responsibilities—which include enforcement not only of this occupational health and safety standard but several others—the presence of a local ordinance with its own enforcement mechanism will greatly enhance the likelihood that the shared goals of both the federal and state regulations will be achieved.

Other differences between the ordinance and the federal standard include the following:

—The ordinance covers a broader group of employers than those subject to the federal standard. It is undisputed, however, that the ordinance is not preempted to the extent that it applies to employers not subject to the standard.

—The ordinance provides for the establishment of a Master List of Hazardous Chemicals to which the various labeling and disclosure requirements are applicable, while the federal standard, although identifying certain hazardous chemicals, assigns to chemical manufacturers and importers the responsibility of determining which other chemicals are hazardous. It is therefore possible that the ordinance might cover some chemicals not subject to the federal standard, or vice versa.

—The labeling and MSDS provisions of the ordinance require that each hazardous chemical be identified by its technical name (§§ 1830.03(a), 1830.07, 1830.10), while the federal standard provides the option of using either the technical name or "any designation such as code name, code number, trade name, brand name or generic name." (§§ 1910.1200(c), (f)(1), (g)(2)(i)) Use of

the technical name would, of course, constitute compliance with both regulations.

—The federal standard requires the labels on hazardous chemicals to provide "appropriate hazard warnings," but does not otherwise prescribe the nature of such warnings. (§ 1910.1200(f)(iv)(2)) The ordinance specifically requires a cancer warning for all chemicals identified on the Master List as carcinogens (§ 1830.07(a)(3)), and a reproductive warning for all chemicals that pose a reproductive hazard. (§ 1830.07(a)(4))

—The ordinance, unlike the federal standard, requires that certain information concerning hazardous chemicals be filed with local authorities.

—There are some differences in the protections provided by the ordinance (§ 1830.14) and the federal standard (§ 1910.1200(i)) for trade secrets, and the procedures by which those protections may be invoked.

THE QUESTIONS ARE SUBSTANTIAL

This case presents questions of fundamental importance concerning both the Occupational Safety and Health Act of 1970 and, more generally, the law of federal preemption. The importance of these questions is underscored by the unusually large number of *amicus* briefs that were filed below by organizations representing a broad spectrum of industry and labor interests as well as by the Secretary of Labor. At stake in this case is not merely the validity of one local ordinance, but the right of all local governments to enact "right-to-know" legislation to protect the health and safety of their citizens.[3] Also involved is the question of the extent to

[3] In the rulemaking proceeding relating to the federal hazard communication standard, the Department of Labor noted that "six local governments have some type of regulation related to the identification of hazardous substances," and that "three other local governments have introduced proposed legislation either in this

which a federal agency may by regulation preempt state or local law when the governing federal statute itself does not so, a question that is becoming increasingly important in a variety of regulatory contexts. See Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 Va. L. Rev. 1429 (1984).

I.

The threshhold issue is whether Section 18 of the OSH Act, which permits the *states* to regulate matters governed by a federal occupational and health standard only pursuant to state plans that have been approved by the Labor Department, should be construed as totally preempting *local* ordinances regulating such matters. Although the courts below were unanimous in their conclusion that Section 18 applies only to state statutes, not local ordinances—a conclusion with which appellants agree—the question is nevertheless substantial and would necessarily have to be reexamined in connection with this appeal. As the Secretary of Labor stated in his *amicus curiae* brief below, it is "an important and novel question of statutory construction."

There is no need to present in this Jurisdictional Statement a full argument on the merits of this issue, but a few basic points deserve mention. First, we are dealing here with community health and safety, a field which the state and local governments have "traditionally occupied." In such a case, this Court has repeatedly held, the assumption is that state and local legislation was "not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977);

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legislative session or in previous sessions." 48 Fed. Reg. 53284 (1983). In Ohio, in addition to Akron, the cities of Canton, Cleveland, Cincinnati, Kent, Hamilton, and Norwood have such ordinances.

Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 105 S. Ct. 2371, 2376 (1985).

The OSH Act, far from expressing any "clear and manifest purpose" to preempt state and local laws, has as one of its basic objectives to encourage more effective state and local regulation of occupational health and safety. While this purpose is expressed most clearly with respect to the states, there is no indication in either the statute or its legislative history that Congress had any different intent with respect to local governments. The goal of the legislation was to improve the safety and health of American workers through more effective and aggressive regulation at all levels of government.

This goal is apparent even from the Preamble to the legislation, which describes its purposes to be:

> To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; *by assisting and encouraging the States in their efforts to assure safe and healthful working conditions;* by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.

(A. 89a, emphasis added). In the body of the statute itself, the stated purposes include "encouraging the states to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws" and "improv[ing] the administration and enforcement of State occupational safety and health laws . . . ." § 2(11), 29 U.S.C. § 651(11). These goals are implemented, *inter alia*, by provisions for grants to the states "to assist them . . . in identifying their needs and responsibilities in the area of occupational safety and health" and "otherwise improving the administration of State occupational safety and health laws . . . ." § 23(a), 29 U.S.C. § 672(a).

Although Section 18 of the Act places some limits on state authority, its purpose was not to exclude the states

from regulating occupational safety and health but rather to ensure that any such regulation did not undercut or conflict with federal standards. Thus, Section 18(a) preserves the full authority of the states with respect to matters not covered by any federal occupational safety and health standard issued under the Act. Once a federal standard has been adopted with respect to a particular subject, the states are still free to regulate that subject, but only pursuant to a "State plan" that is approved in accordance with Section 18(c). This approval procedure is not designed to discourage state regulation but rather to create a mechanism by which the states, through adoption of satisfactory state plans, could take full control of worker safety and health within their boundaries and *replace* (or preempt) the federal regulation with their own. Thus, once a state plan has been approved and found to have been effective for three years, the federal standard governing the same subject matter ceases to apply in that state and the state's regulation becomes exclusive. *See* § 18(e), 29 U.S.C. § 667(e). To encourage the states to adopt state plans under Section 18, Congress provided for grants to the states both to "assist them . . . in developing State plans" during the first three years after enactment of the OSH Act and then "to assist them in administering and enforcing" such state plans. § 23(a) & (g), 29 U.S.C. § 672(a) & (g). Congress expected at the time the legislation was enacted that "practically all states" would take advantage of these grants to develop their own health and safety laws. *See* H.R. Rep. No. 91-1291, 91st Cong., 2d Sess. 33 (1970) (reprinted in *Legislative History of the Occupational Safety and Health Act*, published by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (1971) (hereinafter "Legis. Hist.") p. 863)

In short, the limitations imposed on state laws by Section 18 were not intended to preempt those laws, but rather to ensure that, once a federal standard was in

place, any state regulation of the same subject matter would meet certain requirements prescribed in Section 18(c)—particularly, the requirement that the state regulation be "at least as effective in providing safe and healthful employment and places of employment" as the federal standard it is intended to displace.[4] The primary goal of Section 18, consistent with the policy of the statute as a whole, is not to preempt state laws but to encourage them.

There is no indication, either in the language of Section 18 or in its legislative history, that it was intended

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[4] By stating that the state regulation must be "at least as effective" as the federal standard, the Act makes clear that the states are free to adopt *more* effective or stringent rules, and that uniformity of regulation is not a goal of the Act. In the courts below, appellees and some of the *amici*, including the Secretary of Labor, suggested that Section 18(c)(2) does limit the authority of the states to adopt different or more stringent regulations by requiring, as a condition of approval of state plans, a finding that such plans "when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce." The legislative history of this language, however, which was added by amendment in the Senate, indicates that it had a very narrow purpose. As explained by Senator Saxbe, its sponsor, the amendment was intended only to prevent the states from setting "differing safety standards" for specific *products*, such as "dirt movers, tractors, and other heavy equipment," which would impede the movement of such products from state to state and thus impose an undue burden on interstate commerce. Legis. Hist. 500-01. *See also id.* at 1018 (remarks of Congressman Erlenborn), 1041 (remarks of Congressman Railsback). Until 1982, the Department of Labor interpreted and applied this provision in accordance with its narrow purpose, but since 1982 the Department has taken the position that *any* state plan must be shown to be "required by compelling local conditions." *See* Foote, *Administrative Preemption: An Experiment In Regulatory Federalism*, 70 Va. L. Rev. 1429, 1452-61 (1984) The author of the cited article concludes that this is a gross misinterpretation of the Act and one of several instances in which the Reagan administration has sought to protect industry from state and local regulation by improper use of administrative preemption.

to place any limits whatsoever on local, as distinguished from state, laws. There is, for example, no provision for approval of "local" plans similar to the provisions governing approval of state plans. Neither is there any provision in the Act for grants to local governments to assist them in administering or enforcing local health and safety laws. The entire mechanism established by Section 18 applies solely to "States."

The courts below cited eight other federal regulatory statutes that contain express preemption provisions, all of which provide explicitly that the laws of both "states and their political subdivisions" are preempted. (A. 10a-11a, 34a). It is hardly likely, therefore, that Congress' failure to mention "political subdivisions" in Section 18 of the OSH Act was a mere oversight, particularly since other provisions of the Act do refer specifically in other contexts to "political subdivision[s]" of the states. §§ 6(b)(1), 18(c)(6), 24(b)(2), 29 U.S.C. §§ 655(b)(1), 667(c)(6), 673(b)(2).

Of course, if the Akron ordinance or any other local law conflicted directly with the OSH Act or a standard issued thereunder, either by making compliance with both a "physical impossibility," *Florida Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963), or by posing an "obstacle to the accomplishment and execution of the full purposes and objectives" of the Act or the standard, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), then to that extent the ordinance would have to give way to the overriding federal law. But that is not the issue here. Although appellees contended below that certain provisions of the ordinance did present such a conflict, the district court found otherwise and the court of appeals did not disagree. The issue here is not whether there is any direct conflict between the Akron ordinance and the federal hazard communication standard, but whether Congress intended to exclude local governments totally from regulating in any manner any area which is the

subject of a federal occupational safety and health standard. For the reasons stated above and by both courts below, we contend that it did not.

II.

Although the courts below were in agreement that the OSH Act itself did not preempt the Akron ordinance, they differed as to whether the federal hazard communication standard should nevertheless be construed as doing so, and if so construed whether the Department of Labor was authorized by the Act to issue such a preemptive standard.

The question of the Department's authority to preempt has an importance that transcends this particular case, because the same question is likely to recur under other regulatory statutes. As one commentator has observed:

> In the last few years, . . . the federal government has declined in regulatory zeal, and states and localities have become more protective. Faced with stricter state laws varying from state to state, businesses have begun to lobby for uniform federal regulations that would preempt more protective state laws. In response, some federal agencies are exercising their preemptive powers, generating conflicts with states whose laws are being challenged. Some agencies are even attempting to declare that state laws on a given issue are preempted by the agency's decision not to regulate.

Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 Va. L. Rev. 1429, 1430-31 (1984) (footnotes omitted). The cited article expresses the view that the Labor Department, as well as other agencies administering other statutes, "have failed to protect the states' interests in health and safety as Congress intended that they do under the administrative preemption provisions," and that "a searching reevaluation of administrative preemption is needed." *Id.* at

1431-32. This case presents an appropriate vehicle for such a reevaluation.

The hazard communication standard does not on its face express any intent to preempt local laws. The only reference to preemption is in Section 1910.1200(a)(2) (quoted at p. 10, *supra*), which merely restates the limited preemptive effect of Section 18 of the Act on *state* laws. It is true that the preambles to the proposed and final standard discussed both state and local laws, and seemed to imply that both would be preempted if a final standard were adopted. (*See* pp. 9-10, *supra.*) There is no indication, however, that the preambles reflected a conscious policy *choice* by the Department of Labor to preempt local ordinances. Rather, they merely reflect the Department's legal opinion that such preemption would be automatic once the standard was adopted. The Department's view, which it expressed in its *amicus curiae* brief in the court of appeals (pp. 11-12), is that "the structure and language of the OSH Act, as well as its history and purposes, all point unmistakably toward *statutory* preemption of municipal ordinances addressed to the same subject as a federal occupational safety and health standard." (Emphasis added.) Given this view of the law, the Department could not have exercised any discretion with respect to this issue, because it apparently did not believe it had any such discretion.

But if the standard is to be interpreted as reflecting an intent to preempt local ordinances, the question remains whether the Department of Labor has authority to issue such a preemptive regulation. To our knowledge, this Court has never been confronted by an administrative agency's effort to preempt an *entire field* of state or local regulation where the underlying federal statute does not itself do so. The cases in which the Court has upheld administrative preemption in the past have involved situations in which only a *specific provision* of state law was preempted, because it directly conflicted

with a federal regulation that was clearly authorized by the underlying federal statute. *See Cable Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (state prohibition on liquor advertising via cable television preempted because it conflicted with FCC regulations governing cable signal carriage); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982) (state prohibition against enforcement of "due on sale" provisions in mortgages preempted because it conflicted with federal regulation expressly authorizing such provisions); *United States v. Shimer*, 367 U.S. 374 (1961) (state prohibition against recovery of balance of mortgage loan remaining outstanding after foreclosure preempted because it conflicted with federal regulation authorizing such recovery by Veterans' Administration under federally guaranteed loan).

The only previous case before this Court which raised the issue of whether a federal regulation preempted an entire field was *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371 (1985), but there the Court found that the agency itself did not intend its regulation to preempt local law. Thus, the Court did not have to decide whether the agency had authority to preempt an entire field of regulation.

Such an effort by an administrative agency to preempt an entire field in the absence of clear legislative authority to do so requires close judicial examination. "The agency is an interested party, not an independent arbiter." Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 Va. L. Rev. 1429, 1441 (1984). Unlike the Congress, whose members represent their respective states, federal administrators have no allegiance to state interests and have an inevitable bias in favor of federal regulatory policies. For this reason, the deference that courts customarily grant to administrative decisions in other areas—and that the court of appeals granted to the Department of Labor in this

case (A. 19a-20a)—is inappropriate with respect to administrative preemption of state and local law. This case affords this Court an opportunity to establish needed standards for determining when preemption of an entire field by administrative fiat should be allowed.

We believe the hazard communication standard, if construed to preempt local right-to-know ordinances, exceeded the Labor Department's statutory authority. This is so not only because, as shown above, the policy of the Act is to encourage, not exclude, state and local regulation, but also because the role of the Labor Department under the Act is quite limited. The Department does not have plenary authority to interpret or administer the Act; its sole function under Section 6, 29 U.S.C. § 655, is to promulgate "occupational safety and health standard[s]." The Act defines that term in Section 3(8), 29 U.S.C. § 652(8), as follows:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

This definition merely gives the Department authority to prescribe rules to be followed by employers to protect the health and safety of their employees. It does not give the Department authority to preempt local ordinances dealing with the same subject matter, so long as they are not in direct conflict with the federal standard.[5]

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[5] In *United Steelworkers v. Auchter*, 763 F.2d 728 (3d Cir. 1985), the question was presented whether the hazard communication standard was properly a "standard" within the meaning of Section 6 of the Act, 29 U.S.C. § 655, or whether it should have been issued as a "regulation" under Section 8(b)(3), 29 U.S.C. § 657(b)(3). The court held that it was properly issued as a "standard," but noted that if it were a regulation its provision

In *Hillsborough County v. Automated Medical Laboratories, Inc., supra,* this Court exercised its appellate jurisdiction to decide whether a federal regulation regulating blood plasma was intended to preempt a local ordinance dealing with the same subject matter. This case presents not only a similar question with respect to another federal regulation dealing with an important health and safety area, but also much broader questions as to the meaning of the underlying statute itself and the agency's authority under it. Moreover, this case provides the Court an opportunity, for the first time, to establish standards for determining when a federal agency may preempt an entire field from state or local regulation. These are all substantial questions warranting the attention of this Court.

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purporting to preempt state laws might well have been beyond the Secretary's authority:

> The Secretary's inclusion of an express reference to preemption in the manufacturing sector appears to have been motivated at least in part by the desire to reduce the regulatory burden posed by multiple state laws. 48 Fed. Reg. 53284 (1983). That purpose is arguably at odds with congressional intention that the OSH Act provide a federal floor for safety in the workplace. Reduction of burdens posed by multiple state laws does not appear to have been a significant congressional concern; rather, Congress favored a uniform federal law so that those states providing vigorous protection would not be disadvantaged by those that did not.

763 F.2d at 734. In other words, the preemption provision of the standard is only valid insofar as it implements Section 18 of the Act; to the extent that it is construed to go farther it conflicts with the purposes of the Act.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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